SCO

301 NLRB No. 64

D--1735
Brooklyn, NY

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

STERLING SLEEP PRODUCTS, INC. a/k/a
GREATER NEW YORK BEDDING CO., AND
COMFORT ASSOCIATES, INC., ITS ALTER EGO;
AND COMFORT INDUSTRIES, INC.
AND ITS SUCCESSOR AND ALTER EGO COMFORT
ASSOCIATES, INC.

and

Cases 29--CA--14859 and
29--CA--14959

AMALGAMATED INDUSTRIES UNION LOCAL 76B
AND ITS DIVISIONS, OF THE INTERNATIONAL
UNION OF ELECTRONIC, SALARIED, MACHINE
AND FURNITURE WORKERS OF AMERICA,
AFL--CIO

DECISION AND ORDER

By Chairman Stephens and Members Cracraft and Oviatt

Upon charges filed by the Union on May 14 and June 29, 1990, the General Counsel of the National Labor Relations Board issued a consolidated complaint on July 11, 1990, against Sterling Sleep Products, Inc. a/k/a Greater New York Bedding Co., and Comfort Associates, Inc., its alter ego; and Comfort Industries, Inc. and its successor and alter ego Comfort Associates, Inc., collectively the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although properly served copies of the charges and the consolidated complaint, the Respondent has failed to file an answer.

On November 8, 1990, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. On November 15, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why

the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The consolidated complaint states that unless an answer is filed within 14 days of service, ''all the allegations in the Consolidated Complaint shall be deemed to be admitted . . . to be true and may be so found by the Board.'' Further, the undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, by letter dated September 19, 1990, informed the Respondent that unless an answer was received by September 28, 1990, a motion for summary judgment would be filed. On October 31, 1990, the Respondent filed a request for an extension of time to file an answer. Pursuant to Section 102.22 of the Board's Rules, the Regional Director for Region 29, by letter dated November 5, 1990, denied the Respondent's request because it lacked any explanation for the failure to file an answer by the final deadline of September 28, 1990.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

Respondent Comfort Industries, Inc. (Industries), a New York corporation, with its principal office and place of business located, since about November 1, 1988, in Brooklyn, New York, has been engaged in the manufacture and wholesale distribution of foam pillows, cushions, and related products. Prior to about November 1, 1988, Respondent Industries had its principal office and place of business in Long Island City, New York (LIC facility). During the calendar year ending December 31, 1989, Respondent Industries, in the course and conduct of its business, sold and shipped from its Brooklyn facility products, goods, and materials valued in excess of $50,000 directly to firms located outside the State of New York.

Since commencing operations on or about November 1, 1988, Respondent Comfort Associates, Inc. (Associates), a New York corporation with its principal office and place of business located in Brooklyn, New York, has been engaged in the manufacture and wholesale distribution of foam pillows, cushions, and related products. During the 12-month period ending December 31, 1989, Respondent Associates sold and shipped from its Brooklyn facility products, goods, and materials valued in excess of $50,000 directly to firms outside the State of New York.

Respondent Sterling Sleep Products, Inc. a/k/a Greater New York Bedding Co. (Sterling), a New York corporation, with its principal office and place of business in Brooklyn, New York, has been engaged in the manufacture, sale, and distribution of mattresses, box springs, and related products. During the 12-month period ending December 31, 1989, Respondent Sterling manufactured, sold, and distributed at its Sterling facility products valued in excess of $50,000

which were shipped from the Sterling facility directly to States other than New York.

We find that Respondent Industries, Respondent Associates, and Respondent Sterling are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union, Amalgamated Industrial Union Local 76B and its Divisions, of the International Union of Electronic, Salaried, Machine and Furniture Workers of America, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Successor, Alter Ego, and Single Employer Relationship

About November 1, 1988, Respondent Associates purchased the assets and liabilities of Respondent Industries, including its equipment, supplies, and materials, and since that date has been engaged in the same business operations, selling the same products, to substantially the same customers, and has as a majority of its employees individuals who were previously employees of Respondent Industries. Based on the foregoing, we find that Respondent Associates has continued the employing entity and is a successor to Respondent Industries.

About November 1, 1988, Respondent Associates was established by Respondent Industries as a subordinate instrument to, and a disguised continuation of, Respondent Industries. At all material times, Respondent Industries and Respondent Associates have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise.

By virtue of the foregoing, Respondent Industries and Respondent Associates are, and at all material times have been, alter egos and a single employer.

Since about February 1, 1990, Respondent Associates has been engaged in the same business operations, selling the same products, to substantially the same customers, has held itself out to the public as a successor to Respondent Sterling, and employs as a majority of its employees individuals who were previously employees of Respondent Sterling. At all material times, Respondent Sterling and Respondent Associates have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise. By virtue of the foregoing, Respondent Sterling and Respondent Associates are alter egos and constitute a single integrated enterprise and a single employer.

B. The Units and the Union's Representative Status

The following employees of Respondent Associates constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All wholesale general factory workers, excepting officers, managers, office help, chauffeurs, foremen, salesmen, guards and supervisors as defined in the Act.

The following employees of Respondent Sterling constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All wholesale general factory workers, excepting officers, managers, office help, chauffeurs, foremen, salesmen, guards and supervisors as defined in the Act.

The Union has been recognized by Respondent Associates and Respondent Sterling, respectively, as the exclusive collective-bargaining representative of their employees in the units described above. Recognition by Respondent Associates has been embodied in successive collective-bargaining agreements between the Union and Respondent Industries, the most recent of which was effective by its terms for the period December 31, 1985, through December 31, 1988. Recognition by Respondent Sterling is embodied in a collective-bargaining agreement with the Union, effective August 16, 1988, to August 15, 1991. At all material times, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the unit employees of Respondent Associates and Respondent Sterling for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

C. Refusals to Bargain

About December 13, 1988, the Union and Respondent Industries and Respondent Associates reached full and complete agreement with respect to terms and conditions of employment of unit employees, which agreement was to be incorporated in a collective-bargaining agreement between the Union and Respondent Industries. Since that date, despite oral and written requests by the Union, Respondent Industries and Respondent Associates have failed and refused to execute a written contract embodying the December 13, 1988 agreement. Respondent Associates has failed to honor and maintain in effect the terms of the December 13, 1988 agreement by failing to make contributions to a pension plan and an insurance fund on behalf of the unit employees since December 17, 1989; by denying access to the Brooklyn facility to Union

Representative Juan Mercado about February 13, 1990, and notifying him that future union access to the Brooklyn/Sterling facility would be limited to the employee lunchbreak; and by failing and refusing to deduct duly authorized dues payments from its unit employees' wages and then remit them to the Union since December 29, 1989.

Since about December 17, 1989, and continuing to date, Respondent Sterling has failed to honor and maintain in effect the terms of the collective-bargaining agreement between Respondent Sterling and the Union effective as of August 16, 1988, to August 15, 1991, by, inter alia, failing to make contributions to the United Furniture Workers Pension Plan A and the United Furniture Workers Insurance Fund (collectively the Plan/Fund) as required by the collective-bargaining agreement. Between about December 17, 1989, and January 26, 1990, Respondent Sterling deducted but failed to remit to the Union the dues that it had deducted from the wages of its employees as required by the collective-bargaining agreement. Since about January 26, 1990, and continuing to date, Respondent Sterling has failed to deduct from the wages of its unit employees or remit union dues as required by the collective-bargaining agreement.

Around April 1990, at its Sterling facility, Respondent Sterling, by Gary Geschwind, its president and agent, bypassed the Union and negotiated directly with its unit employees by soliciting them to work overtime at straight pay on weekends in violation of the collective-bargaining agreement.

Between April and June 5, 1990, Respondent Sterling unilaterally changed existing terms and conditions of employment of unit employees by having nonunit employees perform unit work on weekends at straight-time pay.

By the acts and conduct described above, the Respondent has failed and refused, and is failing and refusing, to bargain collectively and in good

faith with the representative of its employees, and has interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights. Accordingly, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

The Respondent has refused to bargain collectively and in good faith with the representative of its employees and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act as follows:

1. By failing and refusing, from about December 13, 1988, to execute the collective-bargaining agreement agreed to by the Union and Respondent Industries and Respondent Associates.

2. By failing to honor, and maintain in effect, the terms of the December 13, 1988 agreement by failing to make pension plan and insurance fund contributions on behalf of the unit employees, by denying and restricting the Union's access to the Brooklyn/Sterling facility, and by failing to properly deduct and remit union dues.

3. By failing and refusing since about December 17, 1989, to honor and maintain in effect the terms of the collective-bargaining agreement between Respondent Sterling and the Union by inter alia, failing to make contributions to the Plan/Fund on behalf of unit employees.

4. By failing since about December 17, 1989, to properly deduct from the wages of its employees and/or remit union dues to the Union as required by the collective-bargaining agreement between Respondent Sterling and the Union.

5. By bypassing the Union and negotiating directly with unit employees concerning weekend overtime work at the Sterling facility around April 1990.

6. By unilaterally changing the existing terms and conditions of employment of unit employees by having nonunit employees perform unit work on weekends at a straight-time pay rate.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to execute the collective-bargaining agreement reached with the Union on December 13, 1988, and comply with the terms and conditions of employment as set forth in the collective-bargaining agreements.

We shall order the Respondent to remit to the Union's pension plan and insurance fund moneys owed commencing December 17, 1989, as provided in the Respondent Associates' collective-bargaining agreement with the Union. We shall order the Respondent to remit to the Union's Plan/Fund moneys owed commencing December 17, 1989, as provided in Respondent Sterling's collective-bargaining agreement with the Union. All payments to fringe benefit funds shall be made in the manner set forth in Merryweather Optical Co., 240 NLRB 1213 (1979).

We shall also order the Respondent to make whole employees for any loss of wages or benefits suffered as a result of the Respondent's unlawful conduct, including wages lost because of the assignment of unit work to nonunit employees and the expenses ensuing from the Respondent's failure to make contractually required contributions to fringe benefit funds as set forth in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), affd. mem. 661 F.2d 940 (9th Cir. 1981). Any backpay owing for loss of wages shall be computed in the manner set forth in Ogle Protection Services, 183 NLRB 682 (1970). All

payments to employees shall be made with interest as prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

We shall further order the Respondent to deduct union dues from the wages of unit employees and remit them and any dues previously collected to the Union in accordance with the applicable collective-bargaining agreements, with interest as prescribed in New Horizons, supra.

Finally, we shall order the Respondent to grant the Union access to their facilities as required by the applicable collective-bargaining agreements.

ORDER

The National Labor Relations Board orders that the Respondent, Sterling Sleep Products, Inc. a/k/a Greater New York Bedding Co., and Comfort Associates, Inc., its alter ego; and Comfort Industries, Inc. and its successor and alter ego Comfort Associates, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute the collective-bargaining agreement it reached with Amalgamated Industries Union Local 76B and its Divisions, of the International Union of Electronic, Salaried, Machine and Furniture Workers of America, AFL--CIO about December 13, 1988, and refusing to comply with all the terms and conditions of that contract.

(b) Failing to honor and maintain in effect the terms of the December 13, 1988 agreement, including those provisions pertaining to pension plan and insurance fund contributions, plant access for union agents, and union dues payroll deductions and remittance.

(c) Failing and refusing to make periodic contributions to the United Furniture Workers Pension Plan A, and the United Furniture Workers Insurance

Fund as required by the terms of Respondent Sterling's collective-bargaining agreement.

(d) Failing to properly deduct and remit union dues to the Union as required by Respondent Sterling's collective-bargaining agreement.

(e) Bypassing the Union and negotiating directly with unit employees concerning weekend overtime work at the Sterling facility.

(f) Unilaterally changing existing terms and conditions of employment of unit employees by assigning unit work to nonunit employees.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective-bargaining agreement it reached with the Union about December 13, 1988.

(b) Make the required pension fund and insurance fund contributions for the Associates unit employees, including all moneys due commencing December 17, 1989, in the manner set forth in the remedy section of this decision.

(c) Make the required contributions to the United Furniture Workers Pension Plan A, and the United Furniture Workers Insurance Fund for the Sterling unit employees, including all moneys due commencing December 17, 1989, in the manner set forth in the remedy section of this decision.

(d) Make whole unit employees for any loss of wages or benefits suffered as a result of the Respondent's unlawful conduct, including expenses incurred in connection with the loss of benefits and the assignment of unit work to nonunit employees, in the manner set forth in the remedy section of this decision.

(e) Deduct duly authorized union dues from the wages of unit employees and remit them to the Union commencing December 29, 1989, for the Associates unit employees and commencing December 17, 1989, for the Sterling unit employees, in the manner set forth in the remedy section of this decision.

(f) Grant the Union access to its facilities as required by the applicable collective-bargaining agreements.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amounts due under the terms of this Order.

(h) Post at its facility in Brooklyn, New York, the attached notice marked ''Appendix.''[1] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. January 31, 1991

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Clifford R. Oviatt, Jr., Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to execute the collective-bargaining agreement with Amalgamated Industrial Union Local 76B and its Divisions, of the International Union of Electronic, Salaried, Machine and Furniture Workers of America, AFL--CIO, embodying the rates of pay, hours of employment, and other conditions of employment agreed on between us and the Union on or about December 13, 1988, covering the employees in the appropriate unit described below.

> All wholesale general factory workers, excepting officers, managers, office help, chauffeurs, foremen, salesman, guards and supervisors as defined in the Act.

WE WILL NOT fail to honor and maintain in effect the terms of the December 13, 1988 agreement with the Union, including the provisions pertaining to pension plan and insurance fund contributions, plant access for union agents, and union dues payroll deductions and remittance.

WE WILL NOT fail or refuse to make periodic contributions to the United Furniture Workers Pension Plan A, and the United Furniture Workers Insurance Fund (Plan/Fund) as required by the terms of our Sterling collective-bargaining agreement.

WE WILL NOT fail to properly deduct and remit union dues to the Union as required by our collective-bargaining agreements with the Union.

WE WILL NOT bypass the Union and negotiate directly with our unit employees concerning weekend overtime work at the Sterling facility.

WE WILL NOT unilaterally change existing terms and conditions of employment of our unit employees by assigning unit work to nonunit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL execute the collective-bargaining agreement we reached with the Union about December 13, 1988.

WE WILL comply with the terms and conditions of employment set forth in the collective-bargaining agreements with the Union.

WE WILL, for the period commencing December 17, 1989, make the required pension fund contributions for the Associates unit employees; remit to the Union's Plan/Fund for our Sterling unit employees moneys owed as provided in our collective-bargaining agreement with the Union; and WE WILL make whole our

employees for any loss of wages or benefits suffered as a result of our unlawful conduct, including expenses incurred in connection with the loss of benefits and wages lost because of the assignment of unit work to nonunit employees, plus interest.

WE WILL deduct duly authorized union dues from the wages of unit employees and remit them to the Union commencing December 29, 1989, for the Associates unit employees and commencing December 17, 1989, for the Sterling unit employees, plus interest.

WE WILL grant the Union access to our facilities as required by our collective-bargaining agreements with the Union.

STERLING SLEEP PRODUCTS, INC. a/k/a GREATER NEW YORK BEDDING CO., AND COMFORT ASSOCIATES, INC., ITS ALTER EGO; AND COMFORT INDUSTRIES, INC. AND ITS SUCCESSOR AND ALTER EGO COMFORT ASSOCIATES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 75 Clinton Street, Eighth Floor, Brooklyn, New York 11201-4201, Telephone 718--330--2862.